

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARY C.

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

CASE NO. C21-5488-BAT

**ORDER REVERSING AND
REMANDING FOR RECALCULATION
OF BENEFITS**

Plaintiff appeals¹ the Appeals Council's finding that her Washington State lump sum permanent partial disability (PPD) benefits constitute "periodic benefits" that offset her disability insurance benefits (DIB) under 42 U.S.C § 424a(a). *See* Dkt 29.

Plaintiff received PPD workers compensation benefits under Washington State law. Shortly after receiving a second PPD award, the ALJ found Plaintiff disabled. The ALJ calculated Plaintiff's DIB benefits finding under Washington law, Plaintiff's PPD benefits were not "periodic benefits" that are subject to a § 424a(a) offset. Tr. 17-18. The Appeals Council reversed citing the Administration's policy that lump sum Washington State PPD payments are subject to offset. The Appeals Council consequently applied an offset to the time period between

¹ Because the Court grants Plaintiff the relief requested, the optional reply brief need not be filed.

1 April 2014 and September 2014, and reduced Plaintiff's DIB benefit amount for the period to
2 \$379.00. Tr. 6-7.

3 While there is no dispute that under 42 U.S.C. § 424a(a), DIB benefits are reduced when
4 a claimant receives "periodic benefits" from the state, the parties debate whether Washington
5 PPD payments constitute "periodic benefits." The Court has no binding precedent to apply to
6 resolve this debate.

7 The Commissioner argues the state PPD Plaintiff received are "periodic benefits" because
8 the plain language of § 424a(a) requires an offset and the Commissioner's policies establish
9 Washington PPD is a periodic benefit. The Commissioner contends the statute plainly subjects
10 all forms of PPD to offset. But the only Ninth Circuit decision of precedential value is at odds
11 with this contention and indicates the language of § 424a(a) is not plain in that it does not apply
12 uniformly to all states' benefits. In that decision, the Court addressed § 424a(a) by relying on an
13 Oregon Supreme Court decision "emphasiz[ing] that 'the legislature intended workers'
14 compensation benefits to provide wage replacement.'" *Hodge v. Shalala*, 27 F.3d 430, 433 (9th
15 Cir. 1994) (quotation omitted).

16 The Court thus examines Washington state law interpreting the language and legislature's
17 intent behind Washington PPD benefits. Courts in the Eastern and Western Districts of
18 Washington have analyzed relevant Washington state case law and have reached different
19 results. In *Olson v. Colvin*, 31 F. Supp. 3d 1176, 1180 (E.D. Wash. 2014) and *Wheatley v.*
20 *Colvin*, No. C14-0346-RHW, 2016 WL 447610 (E.D. Wash. Feb. 4, 2016) the court held
21 Washington PPD benefits were not subject to a § 424a(a) offset because Washington's law
22 "serves a dual purpose and it is not designed solely to compensate for the economic loss of
23 earning capacity." *Wheatley* at *4.

1 However, in *Kreutner v. Astrue*, No. C09-5676-JRC, 2010 WL 2376182 (W.D. Wash.
2 Jun. 8, 2010) and *Sutton v. Colvin*, No. C14-1734-JPD, (W.D. Wash. Jul. 16, 2015) the court
3 held the § 424a(a) offset applied even though “Washington law, unlike the Oregon scheme,
4 specifically does not measure permanent partial disability by the loss of earning power.”
5 *Kreutner*, at *3. The Ninth Circuit reversed the District Court's decision in *Sutton* holding a
6 “Washington state permanent partial disability award was not a periodic benefit subject to
7 offset.” *Sutton v. Berryhill*, 677 F. App'x 341 (9th Cir. 2017). The Ninth Circuit held § 424a(a)'s
8 offset was inapplicable because “[u]nder Washington law,” unlike Oregon law, “an award of
9 workers’ compensation benefits for permanent partial disability is not wage compensation
10 intended to cover a claimant's lost earning capacity.” *Id.* at 342 (citations omitted).

11 The Commissioner argues Courts have misread *Hodge* and the Ninth Circuit decision in
12 *Sutton* is not binding and wrongly decided. But even an unpublished opinion has persuasive
13 value, Fed. R. App. P. 32.1, and while *Sutton* does not bind the Court, the Court is persuaded by
14 its interpretation of Washington state case law and its conclusions. The issue of whether
15 Washington PPD is subject to offset was also more recently addressed in *Tina C. v.*
16 *Commissioner of Social Security*, No. C19-5735-MLP, 2020 WL (W.D. Wash. Jan. 9, 2020). The
17 Court agrees with the analysis and conclusion reached in the *Tina C.* decision that Washington
18 state PPD are not "periodic benefits" that are subject to offset under § 424a(a) and adopts and
19 incorporates the decision's analysis in concluding the Commissioner in this case erred by
20 reducing Plaintiff's disability benefits based upon her Washington state PPD award.

21 For the foregoing reasons, the Court REVERSES the Commissioner's final decision and
22 REMANDS the case for recalculation of benefits under sentence four of 42 U.S.C. § 405(g).

1 DATED this 20th day of May, 2022.

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4 BRIAN A. TSUCHIDA
United States Magistrate Judge